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**IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS**

FILED
COURT OF CRIMINAL APPEALS
9/25/2017
DEANA WILLIAMSON, CLERK

THE STATE OF TEXAS **APPELLANT**

V.

DANIEL VILLEGAS **APPELLEE**

THE STATE'S REPLY TO APPELLEE'S BRIEF ON PETITION FOR DISCRETIONARY REVIEW

**FROM THE COURT OF APPEALS, EIGHTH DISTRICT OF TEXAS
CAUSE NUMBER 08-15-00002-CR**

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ARGUMENT

The State, in its initial brief on petition for discretionary review (PDR), contended that the Eighth Court erred in upholding the trial court's pretrial ruling suppressing as irrelevant and unfairly prejudicial 37 jail-recorded telephone conversations. *See* (State's PDR brief at 22-63). In response, Villegas, arguing that the State's notice of appeal failed to properly invoke the Eighth Court's jurisdiction, contends that, in satisfying the certification requirement of article 44.01(a)(5), it was not enough that: (1) the elected District Attorney for the 34th Judicial District, Jaime Esparza, personally executed the notice of appeal in this case, *see State v. Muller*, 829 S.W.2d 805, 811-12 (Tex.Crim.App. 1992) (holding that article 44.01 requires the elected prosecuting attorney to "make" the State's notice of appeal either through the physical act of signing the notice or by personally and expressly authorizing an assistant to file a specific notice of appeal on his behalf), and (2) the facts required to be certified under article 44.01(a)(5)–that "the appeal is not taken for the purpose of delay" and that "the evidence is of substantial importance in the case"–are asserted in the body of the

notice of appeal over the signature of the elected District Attorney. *See State v. Furley*, 890 S.W.2d 538, 539 (Tex.App.–Waco 1994, no pet.) (op. on reh'g) (cited with approval in *State v. Redus*, 445 S.W.3d 151, 156 n.17 (Tex.Crim.App. 2014), the case upon which Villegas bases his jurisdictional argument, for the proposition that "...statements in the body of the notice of appeal, asserting that the appeal is not taken for delay and that the evidence is of substantial importance, over the signature of the elected [prosecuting] attorney are sufficient to satisfy the requirements of the statute"); *see also* (Villegas's PDR reply at 39-41).

Rather, Villegas argues that the additional language, "[t]he State certifies that jeopardy has not attached in this case...," somehow served to undermine the elected prosecutor's assertion of the two facts required to be certified under article 44.01(a)(5) because "[a] certification by the 'the State' is not a certification by the 'prosecuting attorney.'" *See* (Villegas's PDR reply at 40). Aside from the general recognition that "the State" is "personified by the prosecuting attorney" in a criminal action, *see Higginbotham v. State*, 807 S.W.2d 732, 740 (Tex.Crim.App. 1991) (Clinton, J., concurring), this Court in *Redus* expressly held that *all* that is required to satisfy the article 44.01(a)(5) certification requirement is a written assertion, signed by the prosecuting attorney, of the two necessary facts: (1) that the appeal is not taken for the purpose of delay, and (2) that the evidence is of

substantial importance. *See Redus*, 445 S.W.3d at 156. No particular language is required, so long as the elected prosecutor vouches for these two facts. *See id*.

In this case, the Eighth Court correctly held that the elected prosecuting attorney's certification was sufficient to confer appellate jurisdiction because, by asserting that the appeal is not taken for the purpose of delay and that the evidence is of substantial importance, and by placing his own signature below those representations of fact, the prosecuting attorney vouched for, and thus properly certified, the two facts required to be certified under article 44.01(a)(5). *See State v. Villegas*, 506 S.W.3d 717, 729-30 (Tex.App.–El Paso 2016, pet. granted); *State v. Villegas*, 460 S.W.3d 168, 170 (Tex.App.–El Paso 2015) (op. on motion); *Furley*, 890 S.W.2d at 539 (upholding a substantially identical certification in which the elected prosecuting attorney merely placed his signature below the assertions or representations that "Defendant's motion was granted suppressing evidence which is of substantial importance to the prosecution of this case" and "[t]his appeal is not taken for the purpose of delay...").

Contrary to Villegas's assertions, the two facts required to be certified under article 44.01(a)(5) were not "...established inferentially," *see* (Villegas's PDR reply at 41), but were plainly stated in the body of the State's notice of appeal. The prosecuting attorney vouched for those facts by placing his signature below

those representations of fact. That is all that is required under article 44.01(a)(5). *See Redus*, 445 S.W.3d at 156 (holding that article 44.01(a)(5) "...requires only a written and signed assertion of the two necessary facts..."); *State v. Johnson*, 175 S.W.3d 766, 767 (Tex.Crim.App. 2005) ("[Article 44.01(a)(5)] requires only that the *State* '*certif*[*y*] to the trial court that the appeal is not taken for the purpose of delay and that the evidence, confession, or admission is of substantial importance in the case.'") (emphasis added).[1]

For these reasons, the Eighth Court did not err in rejecting Villegas's jurisdictional argument.

[1] Villegas's argument that article 44.01 somehow prohibits the elected attorney from certifying anything in a representative capacity is also unavailing. By its plain language, article 44.01 requires, not just the signature of any attorney, but the signature of the attorney who serves, in a representative capacity, as the elected prosecutor in the court hearing the case. *See* TEX. CRIM. PROC. CODE art. 44.01(a)(5), (i).

STATE'S REPLY TO VILLEGAS'S PRESERVATION ARGUMENTS:
Villegas's preservation arguments are factually incorrect.

ARGUMENT

Villegas is incorrect in his assertion that the State did not alternatively argue in the Eighth Court that the trial court prematurely determined, in a pretrial proceeding, that the recordings are irrelevant because they contain hearsay. *See* (Villegas's PDR reply at 44). In its brief in the Eighth Court, the State alternatively argued that establishing the factual predicate for the admission of evidence under certain hearsay exemptions would require evidentiary development beyond what was appropriate for a pretrial hearing. *See* (State's appeal brief at 59-60). In the Eighth Court, Villegas attempted to characterize this alternative argument by the State as some type of "concession." *See* (Villegas's appellate brief at 106, 110). Because Villegas's argument in this regard is factually incorrect, it should be overruled.

Villegas is also incorrect in his contention that the State failed to raise, in its PDR, the argument that the jail recordings are not otherwise excludable on the grounds that their relevance is undermined by inadmissible hearsay contained therein. *See* (Villegas's PDR reply at 66). As the State discussed in its PDR, the trial court ruled that the recordings are irrelevant partly because the recordings

contain (in the trial court's opinion) inadmissible hearsay statements. *See* (State's PDR at 17-19). In upholding the trial court's relevance determinations, the Eighth Court agreed that the relevance of the recordings was undermined by the trial court's exclusion of the alleged hearsay statements contained therein, such that any remaining statements by Villegas lacked sufficient context to be relevant. *See Villegas*, 506 S.W.3d at 748.

Thus, the State's analysis as to whether, under the proper standard of review for relevance determinations, the trial court properly ruled that the recordings are irrelevant because they contain inadmissible hearsay statements discussed whether those statements are in fact inadmissible hearsay. And contrary to Villegas's assertions that the State did not provide this Court with a basis to review the hearsay determinations upon which the trial court predicated its relevance rulings, the State specifically argued in its PDR that the statements the trial court deemed to be hearsay are either not being offered for their truth or fall under a hearsay exemption. *See* (State's PDR at 17-19); *see also State v. Brabson*, 976 S.W.2d 182, 200 (Tex.Crim.App. 1998) (McCormick, P.J., concurring) (opining that this Court should address all questions of law "predicate to an intelligent resolution" of

the grounds upon which it grants review). Because Villegas's argument in this regard is factually incorrect, it should be overruled.[2]

For the reasons stated above and in the State's initial PDR brief, the Eighth Court did not err in rejecting Villegas's jurisdictional argument, but erred in upholding the trial court's suppression order.[3]

[2] Although the State disagrees with much, if not all, of Villegas's recitation of facts, particularly to the extent those alleged facts are based on the trial court's previous unsupported habeas findings and any premature resolution of disputed evidentiary and elemental facts properly resolved by a jury at trial, *see* (Villegas's PDR reply at xv-xvii, 1-25), the appropriate venue for the State to specifically rebut and disprove Villegas's defensive evidence is at trial and not in this appeal (and certainly not pretrial). In other words, Villegas seeks to improperly utilize a pretrial mechanism to have a trial court (and now appellate courts), rather than a jury, decide the issue of his guilt.

[3] As to the remainder of Villegas's arguments, those issues have already been briefed in the State's initial PDR brief.

PRAYER

WHEREFORE, the State prays that this Court reverse the judgment of the Eighth Court and remand the case to the trial court for further proceedings.

Respectfully submitted,

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/s/ Lily Stroud
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CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the foregoing document contains 1,501 words.

/s/ Lily Stroud
LILY STROUD

CERTIFICATE OF SERVICE

(1) The undersigned does hereby certify that on September 22, 2017, a copy of the foregoing reply to appellee's brief on petition for discretionary review was sent by email, through an electronic-filing-service provider, to appellee's attorneys: Joe A. Spencer, Jr., joe@joespencerlaw.com; and John P. Mobbs, johnmobbs@gmail.com.

(2) The undersigned also does hereby certify that on September 22, 2017, a copy of the foregoing reply to appellee's brief on petition for discretionary review was sent by email, through an electronic-filing-service provider, to the State Prosecuting Attorney, information@SPA.texas.gov.

/s/ Lily Stroud
LILY STROUD